A

CHONG CHEE CHUNG

v.

STANDARD CHARTERED BANK MALAYSIA BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
LINTON ALBERT JCA
AZIAH ALI JCA
C [CIVIL APPEAL NO: A-02-1055-2010]
20 FEBRUARY 2012

LAND LAW: *Order for sale - Setting aside - Application for - Bank sold appellant's loan account to Syarikat Mystic Bay by vesting order -*
D *Whether all proceedings in relation to appellant's loan to continue as if Mystic Bay a party in place of bank - Whether appellant had no outstanding debt with bank - Whether appellant liable to settle debt - Whether there was no basis for order for sale to be set aside - Banking and Financial Institutions Act 1989, s. 50(3)*

E

LAND LAW: *Caveat - Removal of - Application for - Whether there was valid ground for appellant's lodged caveat to remain*

The appellant appealed against the decision of the High Court dismissing his application (encl. 45) to set aside an order for sale
F by public auction obtained by the first respondent, Standard Chartered Bank Malaysia Berhad ('the bank'). The appellant, the registered owner of land ('the land') had charged the said land to the bank for housing loan facilities. The appellant defaulted in his repayments. The bank then issued the requisite Form 16D notice
G and instituted action and subsequently obtained an order for sale. Pursuant to the order for sale, the appellant's land was successfully auctioned and the second respondent was the successful bidder. The second respondent had paid the full price but was unable to register the said land in his name due to a
H private caveat on the land lodged by the appellant. The second respondent filed an application to remove the said caveat, which was dismissed by the High Court. The second respondent appealed. The appellant's appeal and the second respondent's appeal were heard simultaneously. The appellant contended that
I the appellant had no outstanding debt with the first respondent because by a vesting order made by the High Court, the bank had sold the appellant's loan account to one Syarikat Mystic Bay

('Mystic Bay'). It was the appellant's submission that since the vesting order had not been registered with the land office therefore Mystic Bay could not be a party to the auction sale. The bank however argued that the vesting order allowed for the action against the appellant to be continued by Mystic Bay.

Held (dismissing appellant's appeal; allowing second respondent's appeal)
Per Aziah Ali JCA delivering the judgment of the court:

(1) The vesting order herein was made under s. 50 of the Banking and Financial Institutions Act 1989 ("BAFIA"). Based on cls. 4.10, 4.11 and 4.12 of the vesting order, on the completion date, the right of the bank in relation to the appellant's loan account was transferred to Mystic Bay and all proceedings in relation to the appellant's loan commenced by the bank and pending shall continue as if Mystic Bay was a party in place of the bank *(Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors; PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd)*. (paras 5 & 6)

(2) The submissions that the appellant had no outstanding debt with the bank was misconceived. There was no evidence produced to show that the appellant had settled his debt. Notwithstanding the sale by the bank and the purchase by Mystic Bay of the appellant's loan account, the appellant's debt was in no way extinguished and his liability to settle his debt remains. (para 7)

(3) There was no basis for the order for sale to be set aside and therefore the appellant's appeal was dismissed. Consequent to this, there was no valid ground for the appellant's lodged caveat against the land to remain. The second respondent's application for the caveat to be removed was allowed. Hence, the appeal by the second respondent, the successful bidder, was allowed. (para 8)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merayu terhadap keputusan Mahkamah Tinggi menolak permohonannya (lampiran 45) untuk mengenepikan perintah jualan melalui lelong awam yang diperolehi responden pertama, Standard Chartered Bank Malaysia Berhad ('bank'). Perayu, pemilik berdaftar tanah ('tanah') telah menggadai tanah tersebut ke bank untuk kemudahan pinjaman perumahan. Perayu gagal dalam

pembayaran balik. Bank selepas itu telah mengeluarkan notis yang diperlukan Borang 16D dan memulakan tindakan dan seterusnya telah memperolehi perintah jualan. Di bawah perintah jualan, tanah perayu telah berjaya dilelong dan responden kedua adalah pembida yang berjaya. Responden kedua telah membayar harga penuh tetapi gagal mendaftarkan tanah tersebut kepada namanya disebabkan terdapatnya kaveat persendirian di atas tanah tersebut yang telah dimasukkan oleh perayu. Responden kedua telah memfailkan permohonan untuk membatalkan kaveat persendirian, yang telah ditolak oleh Mahkamah Tinggi. Responden kedua membuat rayuan. Rayuan perayu dan rayuan responden kedua telah didengar secara serentak. Perayu berhujah bahawa perayu tidak mempunyai hutang yang belum dijelaskan dengan responden pertama kerana melalui perintah letakhak yang dibuat oleh Mahkamah Tinggi, bank telah menjual akaun pinjaman perayu kepada satu syarikat Mystic Bay ('Mystic Bay'). Ia adalah hujahan perayu bahawa oleh kerana perintah letakhak tidak didaftarkan dengan Pejabat Tanah, oleh itu Mystic Bay tidak boleh menjadi pihak kepada jualan lelong itu. Bank walaubagaimanapun berhujah bahawa perintah letakhak membenarkan tindakan terhadap perayu diteruskan oleh Mystic Bay.

Diputuskan (menolak rayuan perayu; membenarkan rayuan responden kedua)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Perintah letakhak dibuat di bawah s. 50 Akta Bank dan Institusi-Institusi Kewangan 1989 ("BAFIA"). Berdasarkan kl. 4.10, 4.11 dan 4.12 perintah letakhak, pada tarikh penyelesaian, hak bank berhubungan dengan akaun pinjaman perayu telah dipindahkan ke Mystic Bay dan segala prosiding-prosiding berhubungan dengan pinjaman perayu dimulakan oleh bank dan sementara menunggu akan diteruskan seumpama Mystic Bay adalah pihak yang menggantikan bank *(Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors; PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd)*.

(2) Hujahan-hujahan perayu bahawa beliau tidak mempunyai hutang yang belum dijelaskan dengan bank adalah silap. Tiada keterangan dikemukakan untuk menunjukkan bahawa perayu telah menyelesaikan hutangnya. Walaupun terdapat jualan oleh bank dan pembelian akaun pinjaman perayu yang dibuat oleh Mystic Bay, hutang perayu tidak dihapuskan dan tanggungjawabnya untuk menyelesaikan hutangnya tetap kekal.

(3) Tiada asas untuk perintah jualan diketepikan dan oleh itu rayuan perayu telah ditolak. Akibat ini, tiada alasan sah untuk kemasukan kaveat perayu ke atas tanah itu dikekalkan. Permohonan responden kedua untuk pembatalan kaveat dibenarkan. Oleh itu, rayuan oleh responden kedua, pembida yang berjaya, dibenarkan.

Case(s) referred to:

Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(foll)***

Pantai Bayu Emas Sdn Bhd & Ors v. Southern Bank Bhd [2009] 2 CLJ 630 FC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 50(1), (3)

National Land Code, s. 420

For the appellant - ST Lee; M/s ST Lee & Partners

For the 1st respondent - James Devadason (Mohd Nizam with him); M/s Maxwell Kenion Cowdy & Jones

For the 2nd respondent - Lee Pooi Mun (Loke Su-Yi with him); M/s Khong & Son

[Appeal from High Court, Ipoh; Originating Summons No: 24-1536-2004]

Reported by Suhainah Wahiduddin

JUDGMENT

Aziah Ali JCA:

[1] The appellant appeals against the decision of the learned High Court judge dismissing with costs his application (encl. 45) to set aside an order for sale by public auction obtained by the 1st respondent, Standard Chartered Bank Malaysia Berhad ("the bank"). By a unanimous decision we dismissed the appeal and affirmed the decision of the learned judge for the reasons we set out below.

Salient Facts

[2] The appellant was the registered owner of land known as HSD(D)KA 1364/75, Lot No.11899s, Bandar Ipoh (S), Daerah Kinta, Perak ("the land"). The appellant had charged the said land to the bank for housing loan facilities. The appellant defaulted

in his repayments. The bank then issued the requisite Form 16D notice and instituted action and on 27 July 2005 the bank obtained the order for sale.

[3] Pursuant to the order for sale the appellant's land was successfully auctioned on 20 February 2008 and the 2nd respondent was the successful bidder. The 2nd respondent had paid the full price but was unable to register the said land in his name due to a private caveat on the land lodged by the appellant. The 2nd respondent filed an application (Ipoh High Court Originating Summons No. 24-468-2010) to remove the said caveat. The learned judge dismissed his application, and the 2nd respondent filed an appeal *vide* Civil Appeal No.A-02-2622-2010. We heard this appeal and the 2nd respondent's appeal simultaneously.

The Appeal

[4] Before us learned counsel for the appellant submits that the appellant had no outstanding debt with the 1st respondent because by a vesting order dated 20 November 2007 made by the Kuala Lumpur High Court (see pp. 135-189 of appeal record) the bank had sold the appellant's loan account to one Syarikat Mystic Bay Sdn Bhd. ("Mystic Bay"). Counsel contends that although the appellant had no outstanding debt with the bank as the bank had sold off his loan account to Mystic Bay, yet the bank carried out the auction sale on 20 February 2008. It is submitted that cl. 5 of the vesting order states that the alienated land, or share or interest shall vest with Mystic Bay upon registration of the vesting order at the land office. Counsel submits that since the vesting order had not been registered with the land office therefore Mystic Bay could not be a party to the auction sale. For the bank learned counsel submits that cls. 4.3, 4.6, 4.9, 4.10, 4.11 and 4.12 of the vesting order allows for the action against the appellant to be continued by Mystic Bay. Counsel refers to *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131 and *Pantai Bayu Emas Sdn Bhd & Ors v. Southern Bank Bhd* [2009] 2 CLJ 630 in support of his submissions.

[5] The vesting order herein was made under s. 50 of the Banking and Financial Institutions Act 1989 ("BAFIA"). Section 50(3) of BAFIA provides as follows:

> (3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

In the case of *Phileoallied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 the plaintiff's business and assets had been vested in Malayan Banking Bhd ("Maybank") pursuant to a vesting order. At the hearing of foreclosure proceedings a preliminary objection was raised by counsel for the defendants that the plaintiff could not proceed with the originating summons unless and until the registered charge had been registered in the name of Maybank by way of filing the vesting order in the appropriate land registry. The view advanced for the defendant was that under s. 50(3) vesting could only take effect after it had been registered with the relevant authority. For the plaintiff it was submitted that under s. 50(3), the vesting order superseded all written laws, even the National Land Code, and that the terms of the said vesting order allowed the plaintiff's originating summons to be continued without the necessity of substituting Maybank as the plaintiff or transferring and registering the registered charge in the name of Maybank at the appropriate land registry. In his judgment Low Hop Bing J (as His Lordship then was) states that the words of s. 50(3) of BAFIA which expressly provides that the vesting order "shall have effect according to its terms notwithstanding anything in any law or in any rule of law" prevails over or supersedes the provisions of both the Rules of the High Court 1980 and the National Land Code and where there is inconsistency between the provisions of two Acts of Parliament, as in s. 420 of the National Land Code and s. 50(1) and (3) of BAFIA, the latter which was enacted some 24 years later must prevail. Hence His Lordship held that:

A (a) the vesting order is all encompassing; and

(b) the expression in s. 50(3) allows the foreclosure proceedings to continue without the necessity of substituting the successor bank as the plaintiff, or transferring and registering the registered charge in the name of the successor bank, and
B is intended to clearly and unambiguously take overriding precedence over the National Land Code;

In support His Lordship relied on *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors (supra)*. In that
C case *vide* a vesting order made under s. 50(1) of BAFIA, the predecessor bank transferred and vested all its banking business in a successor bank. Pursuant to an order for sale, an auction was carried out in the name of the predecessor bank. The issue before the court was whether the predecessor bank could continue to
D pursue matters relating to foreclosure proceedings in its name after it had already sold all its banking business in Malaysia to the successor bank pursuant to the vesting order. In delivering the judgment of the court Siti Norma Yaakob JCA (as she then was) held inter alia that based on the provisions of s. 50(3) of BAFIA,
E the successor bank was deemed to be a party in all proceedings initiated by or commenced against the predecessor bank.

[6] In the present appeal cls. 4.10, 4.11 and 4.12 of the vesting order state as follows:

F 4.10 where any right or liability of the Vendor (ie, the Bank) in respect of and in relation to the Accepted Loans is transferred to the Purchaser (ie, Mystic Bay), that the Purchaser shall have the same rights, powers and remedies (and in particular the same rights and powers as to taking
G or resisting legal proceedings or making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability as if it had at all times been a right or liability of the Purchaser, including those rights or liabilities in respect of any legal proceedings or applications to any authority pending immediately before
H the Completion Date by or against the Vendor;

4.11 that any judgment or award obtained by or against the Vendor in relation to the Accepted Loans and not fully satisfied before the Completion Date, shall be enforceable by or, as the case may be, against the Purchaser without any
I further act by any party, as if the Purchaser had been a party thereto instead of the Vendor;

4.12 that all legal proceedings, arbitration, tribunal and other proceedings in connection with the Accepted Loans which have not been completed and in which or where the Vendor is a party shall continue as if the Purchaser were a party in place of the Vendor;

Based on the abovementioned clauses, we find that on the completion date ie, 30 November 2007, the right of the bank in relation to the appellant's loan account was transferred to Mystic Bay and all proceedings in relation to the appellant's loan commenced by the bank and pending shall continue as if Mystic Bay was a party in place of the bank. We respectfully adopt the decision of this court in Leong Moh Sawmill and we fully agree with the decision of Low Hop Bing J in *Phileo Allied Bank (Malaysia) Bhd.* Thus we agree with the submissions by counsel for the Bank that the abovementioned clauses of the vesting order clearly allow Mystic Bay to continue with the proceedings against the appellant in place of the bank and there is no necessity for either the bank or Mystic Bay to first register the vesting order with the land office before Mystic Bay can proceed with the action against the appellant.

[7] We find the submissions by counsel for the appellant that the appellant has no outstanding debt with the bank misconceived. There is no evidence produced to show that the appellant has settled his debt. We are of the view that notwithstanding the sale by the bank and the purchase by Mystic Bay of the appellant's loan account, the appellant's debt is in no way extinguished and his liability to settle his debt remains.

[8] For the aforementioned reasons we find no basis for the order for sale to be set aside and therefore we dismissed the appellant's appeal and affirmed the decision of the learned High Court judge. Consequent to our decision, we find no valid ground for the appellant's caveat lodged against the land to remain. Hence we allowed the appeal by the 2nd respondent, the successful bidder, and set aside the order of the learned judge. We allowed the 2nd respondent's application for the caveat to be removed. The 1st and 2nd respondents were awarded costs of RM5,000 each with the deposits awarded to the respective respondent on account of costs.